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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1979

Number 79-5507

THE PEOPLE OF THE STATE OF COLORADO,
PETITIONER/APPELLEE

IN THE INTEREST OF D. A. K.,
A CHILD

AND CONCERNING J. K. S.,
RESPONDENT/APPELLANT

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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MOTION OF APPELLEE TO DISMISS OR AFFIRM

The Appellee, pursuant to Supreme Court Rules 16(1)(b), 16(1)(c), and 53(4) respectfully moves this honorable Court to dismiss the appeal filed herein, or, alternatively, to affirm the judgment of the Supreme Court of Colorado on the following grounds:

1. That no substantial federal question is presented;
2. That there exists adequate state grounds for the decision; and
3. That it is manifest that the questions on which the decision of this appeal depends are so unsubstantial as not to require further argument.

OPINION BELOW

A memorandum opinion of the Supreme Court of Colorado (the same being reported at 596 P.2d 747) is attached hereto as Appendix A.

JURISDICTION

The Appellee does not contest jurisdiction based upon the premise that the highest state court has upheld a state statute against a claim of unconstitutionality.

QUESTION PRESENTED

Whether or not 19-1-103(20)(a), Colorado Revised Statutes of 1973 as amended, which defines a neglected or dependent child as one who has been subjected to "mistreatment" or "abuse" is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because of vagueness if that statute can be read to include emotional abuse as a grounds for an adjudication of dependency or neglect?

STATEMENT OF FACTS

For purposes of this Motion only, the Appellee will accept as generally accurate the Statement of the Case found in the Appellant's Jurisdictional Statement at pp. 4 - 6 thereof.

ARGUMENT

The decisions of this Court and several other federal courts clearly establish that the right of parents to the care, custody and control of their minor children is, although substantial, not unlimited, and that the protection of the moral, emotional, mental and physical welfare of minors is acknowledged to be a legitimate area of state concern well within its legislative powers. See Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Bykofsky v. Burough of Middletown, 401 F. Supp. 1242 (D.C. Pa. 1975), affirmed 535 F.2d 1245 (3d Cir. 1976), cert. denied 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1977); and Newton v. Burgin, 363 F. Supp. 782 (D.C.N.C. 1973), affirmed 414 U.S. 1139, 94 S.Ct. 889, 39 L.Ed.2d 96 (1974). Title 19 of the Colorado Revised Statutes (hereinafter referred by section as C.R.S.) is precisely designed to affect these legitimate ends.

In enacting this law (commonly referred to as the "Childrens' Code") the General Assembly of Colorado not only defined a neglected or dependent child as one who had been mistreated or abused, it also provided that a judicial determination of the existence of these conditions and the most appropriate remedy therefor are to be the result of a system providing for bifurcated hearings. See 19-1-103(20)(a), 19-3-106, and 19-3-109, C.R.S. The first of these hearings (the "adjudicatory") is concerned solely with the existence or nonexistence of abuse, and only in the latter ("dispositional") is any consideration given to the possibility of terminating parental rights as a dispositional alternative. See People in the Interest of M. B., 188 Colo. 370, 535 P.2d 192 (1975); and Johnson v. People in the Interest of W. J., 170 Colo. 137, 459 P.2d 579 (1969).

The Appellant's child was adjudicated dependent or neglected after a three day trial to a jury and her parental rights were terminated after a subsequent two day dispositional hearing to the court. However, the appeal which followed concerned itself only with the adjudication and not the disposition (see the issues raised on appeal copied from the Appellant's Brief in the Court below and attached as Appendix B). Presumeably, this was based upon the Appellant's theory that if the adjudication were to be reversed, the disposition would dissolve of its own accord.

This point is made to emphasize the fact that although

the Appellant makes much of the importance and fundamentality of her parental rights, the only issues before the Supreme Court of Colorado on appeal had not to do with terminating those rights, but were relative only to the adjudicatory trial at which the sole issue was whether or not the subject child was dependent or neglected by virtue of being mistreated or abused. Thus it is that the question of the vagueness of the subject statute must be considered with reference only to that proposition. And thus it also is that the Appellant's reliance on Alsager v. District of Polk County, Iowa, 406 F. Supp. 10 (S.D. Ia. 1975), affirmed 545 F.2d 1137 (8th Cir. 1976) is misplaced. It is clearly stated in footnote 3 at p. 16 thereof that:

> "The court is only concerned with the parents' right in a termination context vis-a-vis the state . . . thus the court's ruling today does not prevent the state from temporarily separating the child from its parents upon an adjudication of neglect or dependency . . . the court's ruling goes only to state action which permanently destroys the family unit, not to a temporary physical separation for the protection of the child." (Emphasis added)

Hence Alsager dealt with the applicability of a statute alleged to be vague in the context of a dispositional proceeding. Herein the adjudicatory trial and that only has been appealed, and the sole issue therein was as stated above. Although parental rights may be terminated if the child is found to be neglected, that determination is made at a subsequent proceeding. The Appellant cannot have both sides of the street. She cannot appeal from the adjudicatory trial and then complain that the termination of the parent-child relationship has such an affect upon "fundamental rights" that the high standards of strictly construed criminal statutes were not adhered to when those rights were not the subject of the proceeding. Nor can she in appealing the one and excluding all reference to the other, overlook this distinction at her convenience and state that,

really though, they are part and parcel of the same transaction when 19-3-106, 19-3-109 and such decisions of the Colorado Supreme Court as People in the Interest of M. B., supra, and Johnson, supra, declare that difference between the two.

In its decision per Justice Jim R. Carrigan (unanimous except for Justice William H. Erickson who did not participate), the Supreme Court affirmed the lower court rejecting each of the Appellant's contentions and declining to accept her analogies and comparisons to criminal law. Repeating its statement from Robinson v. People, 173 Colo. 113, 476 P.2d 262 (1970), it found that "A proceeding to determine whether a child is dependent or neglected is civil in nature". (See Opinion, p.7) While it recognized the substantial rights of parents in such cases throughout, it also recognized that which the Appellant seemingly fails to see. That is that other substantial rights are involved as well, i.e.:

> "The proceeding does not involve the state against the child's parents. Rather, three parties are affected: the child, the parents, and the state. The state is in the position of parens patriae and the matter for determination is what will best serve the interests of the child."

This wording is, essentially, a quote from the decision of the Supreme Court of Oregon in the case of State v. McMaster, 254 Ore. 291, 486 P.2d 567 (1971) wherein similar issues were raised. Since that decision is cited with approval, it is submitted that some additional language therefrom reflects the unfailing logic which lies at the heart of the Colorado Court's decision:

> "That the welfare of the child is the primary purpose does not lead to the conclusion that the rights of the parents are without constitutional protections . . . This emphasis upon the welfare of the child does imply however, that unlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interest of both the child and the

parents. What might be unconstitutional only if the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the childs interests." (Emphasis added)

In addressing the issue of the vagueness of 19-1-103, the Court declared that "An ordinarily reasonable parent can understand what it means to 'abuse' and 'mistreat' a child." (Opinion, p. 8) Then, quoting McMaster, supra, and citing the United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946) it found that:

> "Fundamental fairness does not require a statute to enumerate in all-encompassing examples, or exactly described acts, precisely how poorly a parent can treat a child before risking loss of parental rights . . . Our legal system occasionally requires courts to draw lines . . . Furthermore, the statute is as explicit as could be in order to accomplish the purposes intended . . . The protection of an abused or mistreated child is an area of legitimate legislative concern which does not lend itself to more precise definition. The legislature would find it extremely difficult, if not impossible, to write a statute more specific to accomplish the purposes of protecting a child's safety and welfare while still allowing the juvenile court reasonable flexibility in determining the best interests of the child and society in each case." (Emphasis added)
> (See Opinion, pp. 8 - 9)

The Appellant would now have this Court find fault with the foregoing reasoning and reverse on the apparent theory that in order to protect the rights of the parents, to satisfy the requirements of fundamental fairness to them, to afford due process to them and to avoid being void for vagueness, a child abuse statute must specifically define every conceiveable form of abuse. It is respectfully submitted that the Appellant's argument, which stresses the profoundness of parental rights and ignores the valid purposes of the statute amounts to a naked assertion that their rights are greater than the right of the child to protection and the right of the state to protect him. This it does while ignoring the fact that the decision appealed from was concerned only with the issue of whether or not the

the child in question was abused, and that the subject of the possible termination of parental rights was, as emphasized above, considered in a subsequent hearing which was not appealed from.

The Colorado Court was correct in determining that the requirement of inordinate specificity and exactitude would render the drafting of legislation in this critical area of state concern virtually impossible. In reaching this decision it simply utilized and reiterated principles relative to due process and legislative vagueness previously enunciated by this Court and many others. For instance, it is clearly established that the Constitution does not demand of legislatures scientifically certain criteria of legislation, impossible standards or unattainable feats of clarity. Ginsberg v. State of New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 887 (1968); United States v. Petrillo, supra, Bykofsky, supra; United States v. Maude, 481 F.2d 1062, 156 U.S. App. D.C. 370 (C.A.D.C. 1973); and McMaster, supra. Nor does vagueness invalidate a statute merely because the reviewing court believes that it could have been drafted with greater precision; because it fails to provide for every possible contingency; because it is difficult to determine whether marginal conduct falls within its scope; because it may be more detailed in its provisions; or because ordinary terms are used to express ideas which find adequate interpretation in common usage and understanding. See respectively, Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); Kister v. Ohio Board of Regents, 365 F. Supp. 27 (D.C. Ohio 1973), affirmed 414 S.Ct. 1117, 94 S.Ct. 855, 38 L.Ed.2d 747; Halleck v. Berliner, 427 F. Supp. 1225 (D.C.D.C. 1977); Whitfield v. Simpson, 312 F. Supp. 889 (D.C. Ill. 1970); Dixon v. Pennsylvania Crime Commission, 347 F. Supp. 138 (D.C. Pa. 1972); and Horn v. Burns and Roe, 536 F.2d 251 (8 Cir. 1976).

If due process requires less literal exatitude in a

statute lacking criminal sanctions as indicated in Horn, supra, and Insurers' Action Council v. Heaton, 423 F. Supp. 921 (D.C. Minn. 1973), then the principles stated above deriving from criminal cases should apply with increased force herein. If this Court can find as it did in Rose, supra, that the term "crime against nature" in a criminal statute is not impermissibly vague, then it is not surprising that cases may readily be found wherein terms such as the following have withstood challenges of being void for vagueness: "incorrigible" in a statute authorizing the suspension of a student from school; "gross disobedience or misconduct" in the statute permitting the expulsion of students from school; "incompetent to drive a motor vehicle" in a licensing statute; "injure himself or other person" in an involuntary mental health commitment statute; and "misconduct in office" in a statute providing for the removal of a public official from office. See respectively: Pervis v. LaMarque, Ind. School District, 466 F.2d 1054 (5th Cir. Tex. 1972); Whitfield v. Simpson, supra; Smith v. McGriff, 434 F. Supp. 674 (D.C. Ala. 1976); In Re Alexander, 336 F. Supp. 1305 (D.C.D.C. 1972); and Clark v. Weeks, 414 F. Supp. 703 (D.C. Ill. 1976). If all of these terms are not so vague as to offend the oft-stated rule that the language of a law must not be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, how then is the term "abuse" so different?

It cannot be denied that the challenged statute has a rational relation to a legitimate and constitutionally permissible objective and, such being the case, it cannot be judged vague in a vacuum without consideration of the stated legislative purposes, its overall thrust and the judicial interpretations which have refined its meaning. See Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830; United States v. Jefferies, 45 F.R.D. 110 (D.C.D.C. 1968); Clark v. Weeks, supra. If Title 19 is so examined in its totality and its various sections are considered in context, it can be seen that a genuine and effective effort has been made to insure that the rights of all persons involved in dependency or neglect cases are protected.

In 19-1-102, C.R.S., the General Assembly declared its purposes in enacting the Childrens Code to be:

> "1(a) To secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society;
>
> (b) To preserve and strengthen family ties whenever possible, including improvement of home environment;
>
> (c) To remove a child from the custody of parents only when his welfare and safety or the protection of the public would otherwise be endangered;
>
> (d) To secure for any child removed from the custody of his parents the necessary care, guidance and discipline to assist him in becoming a responsible and productive member of society.
>
> (2) To carry out these purposes the provisions of this title shall be liberally construed." (Emphasis added)

Thereafter, it not only provided for the two tiered system of hearings referred to above, it also established such safeguards as: the requirement that both the summons and the petition shall include a statement that the termination of parental rights is a possibility (19-3-102, 19-3-103); trial by jury at the adjudicatory phase if demanded (19-1-106(4)(a)); discovery pursuant to the Rules of Juvenile Procedures or the Rules of Civil Procecures if the former do not apply (19-1-107, Rule 1, Rules of Juvenile Procedure); representation of the parents by counsel (19-1-106(1)); and representation of the child by a guardian ad litem (19-3-105). All of these things occured during the adjudication appealed from.

In addition to the foregoing, the Supreme Court of Colorado, in interpreting Title 19, has specifically declared that dependency or neglect cases must afford the fundamental fairness required by the Fourteenth Amendment; that parents are presumed to be fit and proper persons to have the care and custody of

their children until overcome by convincing evidence to the contrary; that the interest and welfare of the child control; and that although termination of parental rights is a possibility in every dependency or neglect action, it is by no means mandatory. See Robinson v. People, supra, Devlin v. Huffman, 139 Colo. 417, 339 P.2d 1008 (1959); Fulton v. Martensen, 129 Colo. 125, 267 P.2d 658 (1954); and In Re People in the Interest of M. M., 184 Colo. 298, 520 P.2d 128 (1974). It cannot be said, therefore, that no procedural or judicial standards exists in Colorado concerning cases of this type.

It appears that the argument of the Appellant would reject all of the foregoing as inconsequential and demand instead a legislative listing of all the various forms and manifestations of abuse before the subject statute can be considered valid. And yet in the Jurisdictional Statement filed herein (at p. 6), it is plainly stated that "The Appellant mother in this case recognizes that emotional abuse can be as damaging to a child as physical abuse and acknowledges the state's interest in protecting children from such abuse." (Emphasis added). If she herself recognizes that "abuse" may take the form of "emotional abuse" which her son was found to be a victim of, how can she at the same time claim in good faith that the statute failed to provide her with adequate notice of proscribed activity? The logic of her position seems to be something to the effect that "I knew what was meant but, because I was not informed in exact terms of that which I admittedly recognize, I was not given fair notice and, therefore, the decision below should be reversed."

The Appellant would also urge reversal because (as stated in pp. 7 - 8 of the Jurisdictional Statement) unidentified "Acceptable statutes have been drafted in other states"; because "Caretakers of children across the United States are subject to the sanctions available under dependency and neglect statutes"; because "The problems of abused children have become a matter of increased public interest and debate in recent years"; and because

unidentified "State authorities now inquire into and interfere with the parent-child relationship to an unprecedented degree".

Both of these approaches fly in the face of at least two well established rules of law. One is that a statute must be considered in light of its application under the facts of the particular case involved. See Berry v. City of Portsmouth, 562 F.2d 307 (4th Cir. Va. 1977). Another is that one attacking a statute must show that it lacks specificity with regard to his actual conduct or behavior and not with regard to some hypothetical situation or with respect to the conduct of other parties who might not be forewarned by the statute's alleged vague language. In this regard see United States v. Powell, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); United States v. Truedell, 563 F.2d 889 (8th Cir. N.D. 1977); di Leo v. Greenfield, 541 F.2d 949 (2d Cir. Conn. 1976).

In reading the state court's opinion and then the Appellant's Jurisdictional Statement, it becomes clear that the asserted reasons for this appeal are unsubstantial and that the opinion rests both upon principles established by this Court (and decisions of other courts affirmed by this Court) sufficient to foreclose the issue, and upon adequate state grounds as well. Hence, the asserted federal question lacks substantiality, is without merit and leaves no room for real controversy. See Rose v. Locke, supra, Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975); Crawford v. Missouri, 409 U.S. 811, 93 S.Ct. 174, 34 L.Ed.2d 66 (1972); and California Water Service Co. v. Redding, 304 U.S. 252, 58 S.Ct. 865 (1938), 82 L.Ed.2d 1323.

A fair trial was held and the jury reached its decision. The highest court in the state found that it could have reached the decision it did from the evidence presented, that the trial court committed no error and that the statute in question was as precise as the legislature could reasonably draw it given the nature of its purpose. The Appellant, in pursuing this appeal

while acknowledging the existence of the type of abuse found to exist by the jury and acknowledging the state's right to prevent it, is merely seeking a technical and arbitrary reversal based in large measure upon the hypothetical injury to all the state's parents as a class. She is thus, in effect, merely asking this court to second guess both the trial court and the Colorado Supreme Court as to the validity of this law and its application.

It should be noted that the child whose rights were protected in this case has now been in the care of foster parents for almost five years. They are virtually the only parents he has known and yet he remains in a legal limbo while the slow and arduous appellate process continues its tedious course. Recognizing that it would be a cruel thing indeed to allow him to be adopted so long as there exists any possibility whatsoever of a reversal on appeal which would nullify such an adoption, the Jefferson County Department of Social Services has retained legal custody of him. No one disputes that it is a hard thing to lose a child, but the Appellant was afforded all that due process requires in an action which involved not only her rights but the best interests of her son and the rights of the state. The Supreme Court of Colorado was correct, "Our legal system sometimes requires courts to draw lines." This child is entitled to at least the promise of a stable future and this court should not permit his fate to hang in the balance while the Appellant and her attorneys pursue their "test case" crusade tilting at the windmills of statutory perfection. It is time this matter was ended.

CONCLUSION

For the foregoing reasons this appeal should be dismissed or, alternatively, the decision of the Supreme Court of Colorado should be affirmed. Likewise, the Appellant's alternative request for consideration of this cause via certiorari (Jurisdictional Statment, p. 3) should be denied as well.

It is so moved.

Respectfully submitted,

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